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No. 88-1670

In The
Supreme Court of the United States
October Term, 1988

AMERICAN AIRLINES, INC., et al.,

Cross-Petitioners,

v.

THE CITY OF CHICAGO, et al.,

Cross-Respondents.

CROSS-RESPONDENT BIENEMAN'S BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REASONS FOR DISMISSING, OR IN THE ALTERNATIVE DENYING, THE CROSS-PETITION

I. THE CROSS-PETITION SHOULD BE DISMISSED AS UNTIMELY.

The preliminary issue before this Court as to the Airlines self-styled "Cross-Petition" is whether the Airlines should be allowed to evade the spirit and likely the letter of the ninety day statutory deadline mandated by 28 U.S.C. Section 2101(c). Although phrased in slightly dif-

ferent terms, Petitioner City of Chicago and Cross-Petitioner Airlines raise the identical issue: whether federal statutory law has preempted state law damage remedies. Chicago timely filed a petition for certiorari within the ninety day statutory deadline. The Airlines did not, and let the ninety day statutory deadline pass. Moreover, the Airlines have failed to meet the requirements of either Rule 19.5 or 19.6 of this Court, the exceptions to the ninety day deadline, and therefore have failed to file a timely petition.

The issue as to the application of Rule 19.5 to the Airlines' Cross-Petition is straightforward. May the cross-petition provision of Rule 19.5 be used by one unsuccessful litigant to file an otherwise untimely challenge to the Court of Appeals decision on virtually the identical grounds raised by a fellow unsuccessful litigant who filed a timely petition?

Such tactics violate the spirit if not the letter of Section 2101(c) and Rule 19.5. The apparent purpose of Rule 19.5 is to allow an opposing litigant to raise *additional* issues for consideration by this Court in response to issues raised by a petitioner hostile to the cross-petitioner's interest. Here, in contrast, the interests of the original Petitioner City of Chicago and the Cross-Petitioner Airlines are substantially the same and the issue raised by both is identical: whether federal statutory law has preempted state law damage remedies.

Nor does Rule 19.6 apply to the Airlines' Cross-Petition. Rule 19.6 provides that when a respondent, here the Airlines, wishes to respond to a petition that the respondent supports—here the Petition of the City of Chicago—the respondent must file the response within twenty days of the filing of the petition. The Airlines have failed to meet that deadline. Therefore, the Cross-Petition of the Air-

lines is not timely filed and should not be accepted by this Court.

Given the parallelism of interest and similarity of basic issues raised for consideration by Chicago and the Airlines, the Airlines should not be permitted to evade the ninety day deadline of Section 2101(c). The Cross-Petition should be dismissed as untimely.

II. NOTHING IN THE AIRLINE DEREGULATION ACT OF 1978 PREEMPTS THE POWER OF AIRPORT PROPRIETORS TO CONTROL NOISE OR THE CONCOMITANT LIABILITY OF AIRPORT PROPRIETORS UNDER STATE LAW DAMAGE REMEDIES TO PAY COMPENSATION FOR THE INJURIES CAUSED BY AIRPORT NOISE.

A. The Constitutional Imperative: State Law Is To Be Preserved Absent "Clear And Manifest" Congressional Intent To Preempt.

To properly apply the doctrine of preemption to this controversy, it is essential that this Court re-examine the constitutional framework allocating power between the federal government and the states. Central to this framework is the Tenth Amendment mandate that only those powers specifically enumerated in the Constitution are granted to the federal government with the vast residuum of powers granted to the states. Among the reserved powers left to the states was the power to provide tort law remedies under state law to redress injuries to states' citizens.[1]

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[1] "The provision of tort remedies to compensate for personal injuries 'is a subject matter of the kind . . . traditionally regarded as properly within the scope of state superintendence.' " *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1542 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), quoting *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963).

Thus, *preservation of state power* is at the core of constitutional federalism. The doctrine of "preemption" grounded in the Supremacy Clause of Article VI creates a limited exception to this basic allocation of power to the states. Preemption of state power is the constitutional *exception—not the rule.*

The federal lawmaking power to preempt state power reserved by the Constitution lies with the Congress—not the Judiciary. For the Judiciary to find that Congress has preempted state law, there must be clear and convincing evidence of Congressional intent to preempt. For the Judiciary to preempt in the absence of such intent would be a usurpation by the Judiciary of preemptive power reserved to the Congress as well as a judicial usurpation of constitutionally preserved state power, reserved to the states under the Tenth Amendment.

This basic constitutional framework of federalism—with residual state power preserved absent clear and manifest evidence of *Congressional* intent to preempt—has been repeatedly emphasized by this Court:

> In determining whether a state statute is preempted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our *sole* task is to ascertain *the intent of Congress.*
>
> *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 107 S.Ct 683, 689 (1987) (emphasis added).

> This Court has repeatedly refused to void state statutory programs, absent congressional intent to preempt them. 'If Congress is authorized to act in a field, it should manifest its intention clearly. It *will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention* to

> do so. The exercise of federal supremacy is not lightly to be presumed.'
>
> *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952) (emphasis added).
>
> [The power of the state is] not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress.
>
> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added).

The simple fact that Congress legislates in a general area which is also occupied by various state laws does not *ipse dixit* mandate preemption. Concurrent exercise of both federal and state power exists in many areas *without* preemption of state law. *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); *Louisiana Public Service Comm'n. v. FCC*, 476 U.S. 355 (1986); *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973).[2]

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[2] The fundamental inquiry remains Congress' intent to preempt. Where Congress has not demonstrated a clear and manifest intent to preempt, it is the Judiciary's constitutional duty to preserve the power allocated to the states "to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch*, 414 U.S. 117, 127 (1973).

B. There is No Evidence Of Congressional Intent To Preempt State Law Damage Remedies Nor Is There Any Clear And Convincing Evidence Of Congressional Intent To Bar The Airport Proprietor's Long-Standing Authority To Control The Use Of Its Airport To Limit Aircraft Noise Injury: Indeed, The Evidence Is To The Contrary.

When one examines the relevant statutory language and legislative history, there is no evidence of Congressional intent to preempt state law damage remedies for those injured by aircraft noise. Indeed, the evidence is to the contrary. In Section 1106 of the Federal Aviation Act of 1958, 49 U.S.C. Section 1506, Congress explicitly preserved such remedies. (See discussion in Respondent Bieneman's Brief In Opposition to the City of Chicago's Petition for Certiorari in No. 88-1496, at pp. 4-7.)

Nothing in this Court's 1973 decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), supports preemption of state law damage remedies. In *Burbank*, this Court never addressed the question of Congressional intent to preempt state law damage remedies for injuries caused by aircraft operations. This Court never discussed Congress' explicit anti-preemption provision (Section 1106) as to state law remedies, probably because the issue of state law damage remedies was not before it.

Nor did this Court in *Burbank* determine that airport proprietors were barred by federal law from imposing restrictions on the use of their airports. The dictum in footnote 14—that proprietors can impose restrictions on the use of their airports to reduce the injury caused by aircraft noise—is wholly consistent with the clear and long-standing understanding of the Executive Branch and Congress that there is no preemption of such local proprietor power. (See discussion in Respondent Bieneman's Brief

In Opposition to the City of Chicago's Petition for Certiorari in No. 88-1496, at pp. 8-11.)

At most, *Burbank* should be considered as perhaps an overreaching exercise of judicially crafted implied preemption that was limited to the exercise of the *police* power by the states. (See dissenting opinion of now Chief Justice Rehnquist in *Burbank*.)[3] There was certainly no evidence of Congressional intent to restrict the authority of the proprietor.

Nor is there anything in the Airline Deregulation Act of 1978 which suggests that Congress intended to restrict the powers of airport proprietors to control noise. Airline Cross-Petitioners rely heavily on the provisions of 49 U.S.C. Section 1305(a)(1):

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[3] *Burbank* is limited to an implied Congressional restraint on the *police* power of the States. *Burbank* did not affect the State's power to control its political subdivisions. Where a proprietor of an airport is a municipal government, the State—as the creator of that political subdivision—is free to expand, contract or modify the powers of that political subdivision. The municipal proprietor's authority to build and operate the airport rests on the authorization granted by the State legislature and the State legislature is free to condition continuing authorization on the political subdivision's exercise of restraint in permitting noise injury. It has long been established that a political subdivision of a State is subject to the will of the State legislature, since the political subdivision is a creature of the State. *See, Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *City of Newark v. State of New Jersey*, 262 U.S. 192 (1923). There is nothing in the federal Constitution or federal statutes which empowers the federal government to intrude on the ability of a State to change or modify the authority of its political subdivisions or to allocate authority between the State and various political subdivisions. The Seventh Circuit below reaffirmed this basic principle: "Neither the Constitution nor the Federal Aviation Act, as amended by the Noise Control Act of 1972, determines how Illinois apportions its governmental powers." *Bieneman v. City of Chicago, et al.*, 864 F.2d 463, 471-472 (7th Cir. 1988).

> [N]o State or political subdivision thereof . . . shall . . . enforce any law . . . relating to rates, routes or services of any air carrier. . . .

This is desperation bootstrapping. In the Airline Deregulation Act, Congress was focusing solely on the issues of fares and routes. Congress did not want the states to impose state fare and route restrictions in place of the old CAB federal economic restrictions on fares and routes that Congress was discarding. Section 1305(a) has nothing to do with state law damage remedies for injuries caused by aircraft noise or indeed for state law damage remedies for any aircraft related injury, e.g., remedies for crash victims in the plane and on the ground.

Indeed, Congress recognized the continuing liability of airport proprietors and their concomitant authority to impose restrictions to control airport noise. Not mentioned by the Airline Cross-Petitioners is Section 1305(b)(1) of that same statute. That section provides:

> Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more states as the owner or operator of an airport served by any carrier certificated by the Board to exercise its proprietary powers and rights.

Congress clearly did not want section 1305(a) to be construed as in any way preempting the traditional responsibility and concomitant authority of airport proprietors to impose local controls. Not only did Congress explicitly so state in Section 1305(b) but this intent is reflected in the legislative history. The following colloquy took place between Senator Kennedy and the bill's Senate sponsor, Senator Cannon:

> Mr. KENNEDY. I am concerned that the *long recognized powers of the airport operators to deal with noise and other environmental problems at the local level* may be inadvertently curtailed by this section [Section 1305(a)]. Am I correct in stating that the actions of airport operators presently accepted as valid exercises of proprietary powers, are not intended to be interpreted as "relating to . . . routes or services" of air carriers and are not intended to be preempted by the powers created by this section?
>
> Mr. CANNON. That is correct.
>
> 124 Cong. Rec. 37419-37420, October 14, 1978 (emphasis added).

Thus, the Airlines' attempt to use Section 1305(a) as the pretext for the preemption of state damage remedies caused by airport noise and of the concomitant authority of airport proprietors to control noise must fail. There is no evidence of a Congressional intent to preempt, let alone the "clear and convincing" evidence needed to constitutionally support the ouster of state and local power.

III. THERE IS NO CONFLICT IN JUDICIAL DECISIONS AS TO THE SCOPE OF PROPRIETOR AUTHORITY TO CONTROL NOISE.

The Airline Cross-Petitioners suggest that there is confusion among existing judicial decisions as to the scope of proprietor authority to control noise. There is no such confusion. The Airlines' position stems from a misunderstanding of the respective roles of the federal government and the airport proprietor.

No one suggests that an airport proprietor can tell an airline how high to fly its planes or impose other requirements on the operation of the plane in the air. Such regulation quite properly belongs in the domain of the

Federal Aviation Administration which is responsible for in-flight safety.

Conversely, the federal government has no statutory (and probably no constitutional authority) to tell a state or local government airport operator that it must accept a *minimum* number of flight operations or accept those operations at all, let alone in a particular location. The decision of where to put an airport, how many airplanes to allow to fly in to that airport, and how noisy the planes that use the airport can be, lies in the hands of the airport proprietor.[4]

The relationship between the relative authority of the proprietor and the FAA is illustrated by the *maximum and minimum* number of flights that can use the airport. One flight may not cause noise injury, but tens of thousands of flights may overwhelm the surrounding community and cause significant noise injury. There is no question that the FAA may limit the *maximum* number of flights that can use an airport so as to promote air safety. But the FAA cannot dictate to the airport proprietor that the proprietor must accept a *minimum* number of flights. That decision—which is fundamental to how much noise injury is inflicted on a given locality—rests with the airport proprietor who selects both the size and location of the airport property.

Indeed, the very case law cited by the Airlines supports this position. In *Air Transportation Association v. Crotti*,

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[4] In their "Cross-Petition" the Airlines have finally acknowledged for the first time that they have agreed to indemnify the proprietor City for all tort suits based upon use of O'Hare Airport for landing and take-off of aircraft. (See Airlines' Cross-Petition at p. 4.)

389 F.Supp. 58, 63 (N.D. Cal. 1975), a three-judge federal court upheld a state statute providing for mandatory Community Noise Equivalent Level (CNEL) restrictions for airports and sustained on their face proprietor restrictions which included restrictions on the use of noisy aircraft, curfews, and restrictions on flight frequency.[5] Nothing in *Greater Westchester Homeowners Association v. City of Los Angeles*, 26 Cal.3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), *cert. denied*, 449 U.S. 820 (1980)—also cited by the Airlines—suggests a lesser level of authority. Indeed, all the cases that have addressed the issue of proprietor control—as well as the statements of the FAA—have acknowledged a broad level of authority in the airport operator to limit the number of flights, the types of noisy aircraft, and the timing of flights at a given airport. (See discussion in Respondent Bieneman's Brief In Opposition to the City of Chicago's Petition for Certiorari in No. 88-1496, at pp. 8-11 and cases cited at pp. 10-11.)

[5] The court sustained on their face restrictions which included: "reduction of flight frequency, particularly in the most noise sensitive time periods and by the noisier aircraft". 389 F.Supp at 61.

CONCLUSION

For all the foregoing reasons, Cross-Respondent Lawrence C. Bieneman respectfully requests this Court to dismiss, or in the alternative to deny the Airlines' Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Respectfully submitted,

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